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From the Labour Constitution to an Economic Sociology of Labour Law

Ruth Dukes *

As a doctoral student in London some years ago, I soon found that meetings with my supervisor, Paul Davies, adopted a fairly standard pattern. On the basis of the work I had given him in advance, Professor Davies would summarise progress to date, taking whatever half-baked ideas I had struggled to express in writing and, to my delight, presenting them back to me in fully developed and coherent form. No sooner had the lights begun to flash on in my head – ‘oh yes, that *is* what I meant’ – however, than Paul would quickly turn the discussion to the work that was still to be done: onward and upward, ever onward and upward!

When I first had the opportunity to read the contributions to this Symposium, I was reminded of these supervision meetings. The authors have done me the great service not only of reading my book carefully and sympathetically, but of expressing its arguments with more elegance and clarity than I ever achieved myself. (*This is what I meant.*) In highlighting particular aspects, and raising particular questions, they have also helped me to strike the path towards a new research project: the work still to be done. In what follows, I will not attempt to address every point made by the various contributions, since they already speak very well for themselves. In the spirit of my former supervisor, I will instead take the opportunity to pick up on some of the key issues raised with a view to saying something about the direction in which the research has taken me since the book was published in 2014. Before doing so, a further debt of gratitude must be acknowledged. These papers were first presented as a book panel at the second *Labour Law Research Network* conference in Amsterdam in 2015. I am hugely grateful to Diamond Ashiagbor for organising and chairing that event, with characteristic eloquence and grace, and for compiling this collection of commentaries.

The Idea of the Labour Constitution and the Idea of Labour Law

As is explained in its introduction, *The Labour Constitution* was intended as a contribution to debates regarding the nature and scope of labour law in an era of advanced globalisation – in an era when many of the premises upon which the field was originally constructed and theorised no longer hold true. The initial impetus for its writing arose from my own unwillingness to accept a line of argument, so often heard in recent years, that in light of the very significant changes that had taken place since the postwar decades in our modes of production, employment practices and the regulation of employment relations, traditional narratives regarding labour law had become outdated and were no longer fit for purpose. Though I understood, of course, the basic logic at work here, important questions seemed to me to remain unanswered – especially with respect to the scholarly writings of Otto Kahn-Freund and Hugo Sinzheimer, which I had read and so much admired during the course of my PhD studies. Why, *precisely*, had these traditional narratives become outdated? Which aspects of them were no longer fit for purpose? Could nothing be salvaged or reconditioned of the lessons that they had taught? In forming these questions, I see now that I was influenced to a significant degree by Lord Wedderburn, and the work that he did, in his later years, to make the case for the continued relevance of Kahn-Freund’s principle of collective *laissez-faire*.¹ As things turned out, it was not Kahn-Freund’s collective *laissez-faire* but Sinzheimer’s labour constitution which came to shape the research project and resulting book. The principal argument that I sought to make was that the idea of the labour constitution *was* still relevant to the study of labour law today, not least because it invoked the principle of industrial, or economic, democracy as fundamental to the field.

[T]he idea of the labour constitution used as a framework for scholarly analysis continues to focus our attention on important questions and important fields of enquiry – on questions, not least, of the consequences for workers of the narrowing and disappearance of spaces for democratic deliberation and democratic decision-making as markets continue to expand.²

In my characterisation of the labour constitution as a ‘framework of analysis’, Guy Mundlak (in this symposium) detected a degree of ambiguity: used in application to labour laws

* School of Law, University of Glasgow. I’m very grateful to the five authors who have contributed to this Symposium, and to Diamond Ashiagbor, George Pavlakos and Nicole Roughan for ensuring its publication in time to mark the issuing of the paperback edition of *The Labour Constitution* in December 2017.

¹ R Dukes, ‘Wedderburn and the Theory of Labour Law: Building on Kahn-Freund’ (2015) 44(3) *Industrial Law Journal* 357-384

² R Dukes, *The Labour Constitution: the Enduring Idea of Labour Law* (Oxford 2014), 221

currently in force, did I mean the idea to do primarily descriptive or normative work? In the scheme of the book as a whole, the extended discussion of the development of labour law and industrial relations in postwar Germany and in the European Union was intended, in part, to demonstrate what an analysis ‘framed’ with reference to the labour constitution would entail. Following the example set by Sinzheimer and Kahn-Freund, that analysis was historical in nature, understanding labour law to be part of a process rather than a relatively static and neutral set of rules and institutions: the outcome of political struggles between the social classes. It placed particular emphasis on the role of the state in the regulation of industrial relations (begging the question of which actor(s) or institution(s) might fulfil that role in an era of globalization), and, of course, on workers’ participation and terms and conditions. As Judy Fudge emphasised in her contribution to this symposium, it sought to analyse labour law as an integral element of *the political economy*, recognising that law can be shaped by the wider political economy just as it can give form to the context within which economic activity and political struggles proceed, influencing the courses of action available or attractive to actors. In the final chapter of the book, I sought to describe rather than to demonstrate my ‘labour constitution’ approach, drawing here not only on Sinzheimer, but on Karl Polanyi, and on Wolfgang Streeck’s approach to comparative political economy.³ In characterising the labour constitution as a ‘framework of analysis’, my intention – as underlined in the excerpt above – was to highlight its capacity to enable or encourage scholars to focus on particular questions about the nature and objectives of labour law, and to arrive at particular kinds of answers and conclusions. As such, it would do both descriptive *and* normative work.

Wolfgang Streeck was referred to again in the book in connection with my rejection of the ‘labour market’ as an alternative frame of reference for the analysis of labour law. Adoption of the labour market, and the notion of labour market efficiency, as the lens through which to analyse labour law, seemed to me to result often in an overestimation of the extent of shared interests between workers and employers. The guiding assumption of much of the work in question was that *everyone’s* interests could be served through the identification and implementation of means of orchestrating ‘well-functioning’ labour markets. Following Streeck, and Eric Tucker, I diagnosed the fundamental flaw of such analysis to be the

³ As discussed in W Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy* (Oxford 2009). esp. 237-46

depiction of the economy and markets in abstract, apolitical terms, with labour markets understood simply as sites where willing buyers of labour met with willing sellers.⁴ Conflicts of interest between buyers and sellers were confined, on that understanding, to the matter of price, and the scope for win-win solutions was judged to be wide. Streeck reminded us here of the importance of ‘bringing capitalism back in’ to the analysis; of emphasising the existence of distinct social classes, within capitalist societies, with oppositional political interests.⁵ In *capitalist* labour markets, conflicts of interest extend far beyond the price of labour to include even the fundamental question whether or to what extent labour ought to be treated as something that is bought and sold. Karl Klare voiced the concern, in this symposium, that I might have meant to suggest – wrongly in his view – that capitalism conformed to a ‘metahistorical systemic or structural logic’, and that recognition of this logic must guide or even constrain analysis of labour law. That was not my intention. Rather, I wished only to argue for the enduring significance of political struggles between the social classes as I have outlined here: between, as Streeck put it, pressures for the expansion of markets and the increasing commodification of social relations, on the one hand, and social demands for the political stabilization of relative prices and extant social structures, on the other.⁶

The importance and the extent of conflicts of interest for labour law was emphasised nicely in this symposium by Michael Fischl, through his depiction of his experiences as a frustrated and *over-worked* consumer. His point here was two-fold: to give the lie to the promise we are sold by governments and corporations alike, that the worsening of pay and conditions for workers will result in better and cheaper goods and services for consumers; and to illustrate that, even if this were true, it would make for a principle of economic organisation with a necessarily limited shelf-life – for who will be left to purchase these cheaper goods and services when wages have fallen to subsistence level or below? All of this gives further force to the key point that I sought to make in my book, that the recognition of conflicts of interest in labour law strengthens the case for independent trade unions (or some other form of collective worker voice) *as a matter of democracy*:

⁴ E Tucker, ‘Renorming Labour Law: Can We Escape Labour Law’s Recurring Regulatory Dilemmas?’ (2010) 39 *Industrial Law Journal* 99-138

⁵ Streeck, *Re-Forming Capitalism*, chap. 17

⁶ Streeck, *Re-Forming Capitalism*, 5

If the definition of well-functioning markets and even the prior question of the inherent desirability of markets as a means of organizing social interactions are essentially matters of perspective, then workers ought to be in a position to argue for those laws and institutions which will better protect their interests.⁷

How to study contracts for work within ever-changing economies

Notwithstanding my rejection of labour markets as a useful *framing device* for the analysis of labour laws, I believe that it is quite possible to make the case for the increased importance to labour law today of labour markets as an *object of study*. ‘Labour market’ was a term rarely encountered in the scholarship of either Sinzheimer or Kahn-Freund. This was not because of a lack of interest in economics, or of awareness of the economic nature of the individual employment relationship as involving, at its inception, an agreement to purchase and sell labour power. It had to do, rather, with disciplinary boundaries and with the authors’ self-consciously sociological or socio-legal, rather than economic, approach to their studies; with their insistence that what was most significant about employment was the (social) power relationship that it involved, and the consequent subordination of the worker to the employer. It had to do with their primary focus on the collective regulation of terms and conditions of employment by means of collective bargaining and their observation that, in practice, collective regulation took the place of individual ‘higgling’. Indeed, it was with reference to the complete absence of higgling in most instances, that Kahn-Freund described the contract of employment, famously, as ‘that indispensable figment of the legal mind’.⁸ To the ‘naked eye of the layman’, he observed, the contract was all but invisible. Routinely, it was not expressed in writing, or even verbally by the parties, except in the briefest of terms.

A foreman who is want of an extra labourer goes to the gate of the works and finds there a group of men waiting for a possible job. He picks out the most likely looking man, and tells him that he can have the job. The man hands in his cards and the foreman sets him to work. There has been an offer of work and an acceptance, and in law there is a contract of service.⁹

⁷ Dukes, *Labour Constitution*, 206

⁸ P Davies and M Freedland (eds), *Kahn-Freund’s Labour and the Law* (London 1983), 18

⁹ O Kahn-Freund, ‘Legal Framework’ in H Clegg and A Flanders (eds) *The System of Industrial Relations in Great Britain* (Oxford 1954), 48, citing F Tillyard, *The Worker and the State*, 1948, 3rd ed, 4.

In the past three or four decades, we have witnessed, across the developed world, both the marked decline of institutions for the collective regulation of employment relations and the demise of industrial relations as a field of scholarship. The result has been the transformation of the context within which work contracts are formed, from a ‘system’ of industrial relations, to highly professionalised practices of human resource management (HRM).¹⁰ It is important to recognise, here, that the trajectory has not been, as might have been expected, from collective bargaining to the type of individual negotiation of contractual terms invoked by the notion of ‘deregulation’ and ‘free’ markets.¹¹ The regulatory vacuum that appeared in the absence of trade unions and collective bargaining has been filled instead by HRM practitioners and their legal advisers exercising formalised unilateral control over the employment relation, using a variety of techniques – standard form contracts, substitution clauses, declarations of self-employment – to minimise the portion of legal and economic risk and responsibility to be borne by the employing organisation.¹²

This transformation of the context within which contracts for work are agreed has coincided with – and likely been hastened by – a reorientation of public policy in the field of employment and working relationships that has itself been closely informed by the supplanting of Keynesianism by neoclassicism as the dominant economic discourse. Far from treating labour law and industrial relations as discrete systems with their own particular logics, governments of both the right and centre-left have seemed, increasingly, to regard labour legislation as one part of a tool kit available to them to achieve various macro-economic objectives: lower inflation, cuts in welfare spending. Since the 1990s, the need to address unemployment levels has assumed a growing prominence in government agendas in many countries. In line with new economic orthodoxies, job creation has been pursued for the most part not through publicly funded demand management, but through attempts to ensure the broad economic conditions deemed conducive to private sector growth and employment – chief among these, *labour market flexibility*.

¹⁰ M Freedland, ‘General Introduction’ in Freedland (ed), *The Contract of Employment* (Oxford 2016)

¹¹ W Brown et al, ‘The Employment Contract: From Collective Procedures to Individual Rights’ (2000) 38(4) *British Journal of Industrial Relations* 611-29.

¹² L Barmes, *Bullying and Behavioural Conflict at Work* (Oxford 2015)

So understood, the changing nature of both work contracts, and the context within which they are formed and managed, can be seen to imply the increased importance of labour markets as objects of analysis for scholars of labour law. In contrast to the worker in the Fordist factory, who in the normal course of things could be reasonably sure of a job for life, workers today will likely have direct experience of (external) labour markets several times throughout their working lives. Increasingly, moreover, not only governments and policy-makers, but also workers themselves have begun to think about contracting for work, and about the laws and other institutions that regulate that process, with reference to the labour market within which they understand themselves to act. In a variety of ways, workers are encouraged to identify – first and foremost – as market actors; as entrepreneurs of themselves.¹³ If jobs are to be applied for, the worker must ‘market’ herself to the HR department of the employing organisation; if jobs do not exist, she should ‘employ’ herself: identify a ‘gap in the market’ and arm herself with the skills – ‘human capital’ – necessary to fill it.

As to the question, how we as scholars of labour law ought best to approach analysis of these increasingly ‘marketized’, or commercialised, working relationships - well, here, in particular, there is work still to be done. In his contribution to the symposium, Klare doubts whether Sinzheimer had much to teach us when it came to labour law methodology. In *The Labour Constitution*, I note that Sinzheimer and Kahn-Freund adopted what they called a ‘critical sociology of law’, which aimed to reveal the need for labour law through the identification of the iniquities of private law as applied to the field of employment relations, and the limits of the formal equality and formal freedom that it promised. But there is much more to be said, still, about Sinzheimer’s sociology of law, especially as developed by him in his later years, and about where this fitted within the broader intellectual discourses of the time. Emiliós Christodoulidis highlights too, in this symposium, the potential of genealogy as method: holding the historical framework itself to question and exposing points of foreclosure and discarded alternative narratives.

Since the publication of *The Labour Constitution* in hardback in 2014, I have worked on the development of a new project, which is set now to begin formally in January 2018 with five years’ funding from the *European Research Council*. Entitled *Work on Demand: Contracting*

¹³ A Hochschild and S Garrett, ‘The Personalized Market and the Marketized Self’ in A Hochschild, *So How’s the Family and other Essays* (Berkeley 2013)

for Work in a Changing Economy, the project is focused on precisely these questions of methodology. It begins from a definition of contracting for work as an instance at once of economic, social, *and* legal behaviour. Acknowledging that the behaviour of parties to such contracts may well be economically motivated (especially in situations where the labour market and the act of buying or selling labour are prominent in the actors' own perceptions of what is taking place – as they are likely to be, for example, when a contract for work is initially agreed and formed), it insists, at the same time, on the importance of laws and other norms and institutions in shaping such behaviour. For that reason, it firmly rejects the suggestion that contracting for work can be analysed satisfactorily through the straightforward application of economic methods and economic reasoning, and seeks instead to develop a new methodology that will allow researchers to take account of the economic, social *and* legal aspects of contracting for work; to assess the precise nature and extent of the influence of particular laws, norms and institutions on actors' behaviour, including, for example, actors' use of norms as bargaining tools, or their development of avoidance strategies, or strategies to minimize legal risk. In order to do this, it aims to analyse sets of original and published data, qualitative and quantitative, using a synthesis of approaches drawn from economic sociology, political economy and the sociology of law – and, in doing so, to develop what we might call, an *economic sociology of labour law*. It aims, above all, to *build upon*, rather than to discard, a long tradition of labour law scholarship that was essentially socio-legal in nature, seeking to understand labour laws as part of an historical process, and as the outcome of political conflicts.